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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No.

JOSEPH PARISI,

Petitioner,

vs.

MAJOR GENERAL PHILLIP B. DAVIDSON, Commanding General, United States Army Training Center, Fort Ord, California; CAPTAIN COUGHLIN, Commanding Officer, Hospital Company, United States Army Training Center, Fort Ord, California; STANLEY RESOR, Secretary of the Army,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the

Ninth Circuit, entered in the above-entitled case on December 3, 1970.

CITATIONS TO OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals has not yet been reported in any official or unofficial reports, but a copy of the court's opinion, as served upon counsel, is attached hereto as Appendix A. A copy of the District Court's Order Staying Proceedings and Certifying for Interlocutory Appeal is attached hereto as Appendix B.

JURISDICTION

The opinion and order sought to be reviewed were entered on December 3, 1970 in action number 25773 in the United States Court of Appeals for the Ninth Circuit. The jurisdiction of the United States Supreme Court is asserted under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Where a member of the Armed Forces who has been denied discharge as a conscientious objector applies to the federal district court for a writ of habeas corpus and is thereafter charged by military authorities with refusing to obey an order, is it proper for the federal district court to stay all proceedings in the habeas corpus proceedings pending exhaustion of military judicial remedies, including appeals?

STATUTE INVOLVED

The applicable statute is 28 U.S.C. § 2241(a). It provides in pertinent part as follows:

"Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions...."

STATEMENT OF FACTS

The following statement of facts is taken substantially from the opinion of the Court of Appeals.

Petitioner was drafted on August 22, 1968. Pursuant to Army Regulation 635-20, he filed an application for discharge as a conscientious objector on May 22, 1969, before receiving orders for shipment to Viet Nam.

The initial interviews mandated by AR 635-20 uniformly terminated in Petitioner's favor. However, in November, 1969, the Department of the Army denied Petitioner's application. That office noted two reasons for its decision: (1) that Petitioner's professed beliefs became fixed prior to entering the service, and (2) that Petitioner was not truly opposed to all war due to his religious beliefs, as demonstrated by his attempts thus far to support it.

Parisi then applied to the Army Board for Correction of Military Records (ABCMR) for review of the denial of his discharge. Shortly thereafter, on November 28, 1969, he applied to the United States District Court for the Northern District of California for a writ of habeas corpus.[1/] He therein sought discharge from the Army as a conscientious objector.

In his habeas petition Petitioner claimed that there was no basis in fact for the grounds cited by the Department of

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1/ The procedure by which Petitioner sought habeas corpus shortly after applying to the ABCMR has been recognized as a proper method to invoke the jurisdiction of the federal court, particularly where temporary stay orders are necessary or appropriate. Krieger v. Terry, 413 F.2d 73 (9th Cir. 1969).

the Army in denying his application for a discharge. In addition, Petitioner sought a preliminary injunction pending disposition of the proceeding to prevent respondents from: (1) requiring him to obey an order of August 8, 1969, to undergo training preparatory to being transferred to Viet Nam for duty; and (2) transferring him outside the jurisdiction of the District Court where the proceeding was commenced.

On the day the petition was filed, the District Court, after a hearing, entered an Order enjoining respondents from assigning Petitioner to any duties which required materially greater participation in combat activity or training than was being required of him in his then present duties. This Order was to remain in effect pending decision by the ABCMR on Petitioner's application to it for discharge as a conscientious objector.

The district court Order recites that the court would retain jurisdiction of the case until the ABCMR made its decision. The Order also denied Petitioner's application for a preliminary injunction against his transfer out of the Northern District of California. On December 4, 1969, Petitioner took an interlocutory appeal (No. 25,133 in the Court of Appeals for the Ninth Circuit) from the Order denying his requested preliminary injunction.

About this time, Petitioner received orders to process out of his then duty station at Fort Ord, California, and, following training, to report to the Overseas Replacement Station

at Oakland, California, on December 31, 1969. This was later changed to the United States Army Personnel Center, Fort Lewis, Washington. Petitioner then moved in the Court of Appeals for an order staying his deployment outside the Northern District of California pending disposition of his appeal.

The Court of Appeals denied the motion on December 10, 1969, "on condition that Respondents produce Appellant [Petitioner] in this district if the appeal results in his favor". On December 29, 1969, Mr. Justice William O. Douglas denied a similar application for a stay.

Petitioner reported, on December 31, 1969, as directed, to the United States Army Personnel Center, Fort Lewis, Washington, and he was booked for transportation overseas. He then refused to obey a military order to board a plane for Viet Nam.[2/] He was immediately charged with violating Article 90 of the Uniform Code of Military Justice, 10 U.S.C. § 890, and was confined to the Post Stockade, pending disposition of the charge against him.

On March 2, 1970, while Petitioner's court martial was pending, the ABCMR notified him of its rejection of his application for relief from the Army's denial of his discharge request. Four days later the District Court, pursuant to Petitioner's habeas petition, entered an Order requiring respondents to show cause why a writ should not be issued. The United States responded by moving in the District Court for a stay of the habeas proceedings pending exhaustion of Petitioner's military

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2/ As Parisi stated in his affidavit in the District Court, for him the duties in Viet Nam involved far more serious violation

judicial remedies.

On March 31, 1970, responding to the Government's motion that it abstain pending completion of Petitioner's court martial proceedings, the District Court entered an Order staying its consideration of Petitioner's habeas petition until there was a trial and a final judgment in the military courts on the court martial charges. Petitioner appealed to the Court of Appeals, in action number 25773, from the District Court's stay order.

The District Court did not stay the court martial proceedings pending the Court of Appeals' consideration of the interlocutory appeal, nor did the Court of Appeals; consequently, in the interim between the date of the District Court Order, March 31, 1970, and the date of the acceptance of the appeal by the Court of Appeals, April 24, 1970, Petitioner was, on April 8, 1970, court martialed and convicted of the charge against him. He is presently confined in the United States Army Disciplinary Barracks, Fort Leavenworth, Kansas, serving a sentence of two years at hard labor, with dishonorable discharge. His appeal before the Court of Military Review is now pending.

On December 3, 1970, the Court of Appeals for the Ninth Circuit, in action number 25773, affirmed the District Court's stay order. It is that affirmance which is sought to

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2/ (Continued) of his religious beliefs. That is because the psychological counseling there would involve direct participation in and supporting of combat activities and helping to prepare soldiers for battle, and he could also be required at any time to participate directly in combat and weapons carrying.

be reviewed in this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

This case presents fundamental, and unresolved, questions concerning the doctrine of exhaustion of remedies and the circumstances in which the courts are available to test the legality of confinement in matters touching important personal liberties. In particular these proceedings again raise the issue of what remedies an in-service conscientious objector applicant must exhaust before being permitted to obtain review of an administrative denial of his application on habeas corpus in the federal district courts. As such, this case poses significant issues analogous to those previously before this Court, but not reached in Craycroft v. Farrell, 397 U.S. 335 (1970), vacating and remanding, 408 F.2d 587 (9th Cir. 1969) and Noyd v. Bond, 395 U.S. 603, 685(n.1)(1969). The issues vitally affect the personal and religious freedom of innumerable persons who are subject to military jurisdiction against claims of conscience.

1. The Writ Should be Granted Because the Decision Below has Extended the Doctrine of Exhaustion in an Unprecedented and Erroneous Manner. The holding of the court below - that a conscientious objector applicant, whose administrative request for discharge has been denied, and who then disobeys orders for shipment to a combat zone because he believes those orders to violate his religious beliefs, must exhaust all military judicial remedies, including appeal, before bringing

habeas corpus in the civilian courts - renders substantially nugatory the opportunity for civilian judicial review of such denials. Under that holding, persons such as Petitioner Parisi will be deprived of access to the courts for much if not all of their military term, while their criminal case winds slowly through the military judicial system.[3/] At best, therefore, such decision raises an issue of momentous import in a country which has been involved for the last decade in an increasingly unpopular war and where claims of conscientious objection to participation in the military are substantially increasing. More, the irony of the court's holding below is that the right of access to the courts through the "great writ" of habeas corpus (Fay v. Noia, 372 U.S. 391 (1963)), will be denied to those persons whose scruples against the military are strongest - i.e., persons who refuse to cooperate with the military and are willing to risk military punishment and confinement rather than violate their religious and moral principles.

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3/ Although there are no published studies of which Petitioner is aware, we believe this Court can take judicial notice that exhaustion of the court martial and appellate remedies is a relatively slow process at best. More, there are additional administrative steps which an "in-service" applicant must exhaust in any event under military regulations before seeking civilian judicial review. Compare also the empirical studies referred to by the Fourth Circuit in U.S. ex. rel. Brooks v. Clifford, 412 F.2d 1137 (4th Cir. 1969) which determined that applications to the Army Board for the Correction of Military Records ("ABCMR") take, on the average, more than four months to process.

While Petitioner fully recognizes the important principle of administrative exhaustion and the reluctance of civilian courts to inject themselves too broadly into military affairs, Orloff v. Willoughby, 345 U.S. 83 (1953), we would submit that neither principle need be compromised by a reversal of the decision below. To the contrary, fairly considered, Petitioner seeks only a reasoned accommodation between these principles, which will permit the continued effectiveness of the military's administrative and judicial systems yet would preserve the vital right of access to the courts to test deprivations of fundamental constitutional rights. McKart v. United States, 395 U.S. 185 (1969).

Although nominally involving a procedural issue, Petitioner submits that the significance of the holding below is so great as to substantially undercut the right to civil review of alleged unconstitutional denials of requests for conscientious objector discharge. It is by now settled that at least where a serviceman is denied discharge as a conscientious objector without basis in fact he is deprived of due process and may obtain his release through habeas corpus. Hammond v. Lenfest, 398 F.2d 705 (2nd Cir. 1968); United States ex. rel. Brooks v. Clifford, 409 F.2d 700 (4th Cir. 1969); Gann v. Wilson, 289 F.Supp. 191 (N.D. Cal. 1968).

However, given the admitted fact that such claimants are by and large subject to only limited periods of service, the value of the right to civilian review of such military action is

no greater than the availability of reasonably prompt access to the courts. If the path to the courthouse door is strewn with too many obstacles, or is simply over-long, the fact that relief is theoretically available is of little practical consequence. See e.g., McNeese v. Board of Education, 373 U.S. 668 (1963); Jeffers v. Whitley, 309 F.2d 621 (4th Cir. 1962); Sunshine Publishing Co. v. Summerfield, 184 F.Supp. 767 (D.D.C. 1960). Compare also Note, Judicial Acceleration of the Administrative Process: The Right to Relief from Unduly Protracted Proceedings, 72 YALE L.J. 574 (1963). Petitioner submits that recent decisions, particularly in the Ninth Circuit (including, of course, the instant case) have placed excessive and improper obstacles in the path of persons seeking discharge through federal habeas corpus. He would further urge that what is therefore needed - at this time and from this Court[4/] - is review

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4/ Review in this Court is required, if for no other reason, by the fact that the decision below is squarely in conflict with District Court decisions in Talford v. Seaman, 306 F.Supp. 941 (D. Md. 1969) and Cooper v. Barker, 291 F.Supp. 952 (D. Md. 1968). In Talford, the District Court granted Habeas Corpus relief to an in-service conscientious objector, even though at the time of the Habeas Corpus hearing, there were pending court martial proceedings at which petitioner could presumably have raised wrongful denial of his application for discharge as a conscientious objector as a defense. Similarly, in Cooper, the court granted Habeas Corpus relief to an in-service conscientious objector despite pending court martial proceedings. The court ruled that the right to defend a court martial was not a remedy within the meaning of the exhaustion doctrine. Although the court in Cooper noted that the question of whether wrongful denial of discharge as a conscientious objector could be a defense to a court martial proceeding was at the time unresolved, it further stated that "under this court's view of the pending case, it is not necessary to decide this question". 291 F.Supp. at 960 n.11.

and redefinition of the military remedies which must properly be exhausted before the merits of constitutional claims may be heard and resolved in the federal district courts.

If the writ is granted, Petitioner would urge a fundamental distinction: between (1) exhaustion of procedures designed to provide the very remedy being sought in the habeas proceedings (here discharge as a conscientious objector) and (2) exhaustion of procedures (here court martial) not so designed and in which such remedy is unavailable, or, at best, ancillary.[5/] Thus, it is admitted that prior to seeking habeas corpus relief Petitioner Parisi - as all others similarly situated - was required to make administrative application within the military for discharge as a conscientious objector and await action thereon.[6/] A far different situation, however, is presented by the requirement,

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5/ It is highly questionable whether the remedy required below has even the possibility of granting the relief sought by way of habeas corpus. See U.S. v. Noyd, 18 U.S.C.M.A. 483, 489 n.1 (1969); Lee v. Pearsen, 18 U.S.C.M.A. 545 (1968). We also note that where, as in Petitioner's court martial, there are a number of assignments of error unrelated to the claim of conscientious objection, the conviction could be reversed and the case retried without obtaining a ruling on the conscientious objection claim.

6/ In addition to the direct application procedures provided under AR 635-20, at least the Ninth Circuit has held that an applicant for conscientious objector discharge must exhaust remedies by seeking review in the Army Board for Correction of Military Records. See, e.g. Craycroft v. Farrell, supra. Although whether such exhaustion is properly required need not be determined herein, we would note that such holding is, at best, questionable in light of the subsequent decision of this Court and the vacating and remanding Craycroft and the Fourth Circuit's second decision in United States ex. rel. Brooks v. Clifford, 412 F.2d 1137 (4th Cir. 1969) relying upon this Court's opinion in McKart v. United States, 395 U.S. 185 (1969). See also discussion infra at 15.

imposed below, of exhaustion of military judicial remedies through court-martial and military appellate proceedings - a distinction which has seemingly been recognized in holdings or dicta in numerous decisions prior to the ruling below. See, e.g. Hammond v. Lenfest, supra; Talford v. Seaman, supra; Cooper v. Barker, supra; Gann v. Wilson, supra; Crane v. Hedrick, 284 F.Supp. 250 (N.D. Cal. 1968). Compare also Craycroft v. Farrell, supra [408 F.2d] at 589 n.1 and Noyd v. Bond, supra at 685 n.1. Courts martial are not regularly convened to pass upon denial of conscientious objector applications, but are military judicial tribunals which consider charges of criminal violations of military law. In fact, the sole nexus of such bodies to assertions of conscientious objection is the fact that a serviceman may claim in defense of a charge of refusal to obey orders that the order given was unlawful because of wrongful denial of his application for discharge as a conscientious objector. Thus, here, Petitioner (believing that his Viet Nam shipment orders violated the dictates of his conscience) refused them and raised wrongful denial of his discharge application as a defense to his court martial. Whether, assuming the defense had been accepted, the military court had the power to order discharge remains an open question. Cf. U.S. v. Noyd, supra; Lee v. Pearsen, supra.

In short, the form and species of relief potentially available through the military judicial system is, at best, ancillary to the administrative processing of claims for conscientious objector discharge which Parisi had fully pursued, and

which formed the basis for his habeas corpus action now stayed by the courts below. In such circumstances, Petitioner would propose to argue that neither the policies underlying the so-called "exhaustion" doctrine nor the reluctance of the courts to become precipitously involved in military affairs, justifies a requirement that an in-service conscientious objector applicant pursue the full course of military judicial proceedings before seeking civil review of the administrative denial of his discharge application.

The test which Petitioner would propose to urge before this Court would uphold the integrity of the military processes while leaving open the doors of the civil courts to persons who have diligently pursued their applications for discharge through the requisite phases of administrative processing within the Service. More, consideration and reversal of the decision below will prevent future discharge applicants from facing the unconscionable choice between firmly held religious beliefs and the right to have such beliefs tested in a civil court of law.[7/]

Although we do not purport to deal exhaustively with such cases in the instant petition, we would note that the decisions in Gusik v. Schilder, 340 U.S. 128 (1950) and Noyd v.

7/ Cf. Sherbert v. Verner, 374 U.S. 398 (1963). The irony of Petitioner's case is that even the Court of Appeals in its opinion below recognized that in all probability Parisi would have succeeded on the merits of his application for Habeas Corpus relief. Opinion at 6. Yet he has never had the chance to present his claim on the merits.

Bond, supra - as well as the so-called "state habeas" cases from which these decisions derive - are fully consistent with the position Petitioner would propose to assert in this Court. In each of such cases, the federal habeas corpus petitions sought relief of the precise type which the other forums were intended and able to provide. Thus, for example, in both Gusik and Noyd, petitioner asked the courts to intervene directly in pending military judicial proceedings (prior to any appeal therefrom) in order to consider claims which arose directly out of the military criminal prosecutions and did not give rise to, or involve, any independent claim for habeas relief. Similarly, the requirement that state prisoners must exhaust all collateral remedies in the state courts before seeking release on habeas corpus in federal district court simply reflects the fact that such state procedures are directly intended to treat claims of unlawful detention in the respective state judicial systems. See, e.g. Ex parte Hawk, 321 U.S. 114 (1944); Mooney v. Holohan, 294 U.S. 103 (1935).

By contrast here, Petitioner's habeas corpus petition relates solely to the denial of his administrative request for discharge as a conscientious objector. As pertains to that claim, the subsequent court martial for disobedience of a lawful military order was not only ancillary but essentially random.8/

8/ The procedure is in fact random, at least viewed in the perspective of the traditional rationale for the exhaustion requirement, vis, non-interference and deferral to other tribunals with presumed expertise. Plainly, such rationale, if apposite to the military judicial proceedings, would require that the

2. The Writ Should Be Granted Because The Decision Below Is In Conflict With Other Decisions In The Federal District And Appellate Courts And Appears Contrary To The Rationale Of This Court's Decision In McKart v. United States. The issue squarely presented by the instant proceedings has been before the courts, in varying forms, in numerous recent cases.[9] More, the question of exhaustion in the context at bar has given rise to a welter of conflicting holdings and dicta which undeniably call for clarification from the only forum capable of bringing order to this area of the law. Thus, without discussing such decisions in detail here, we would point out that claims that military judicial remedies must be exhausted have been accepted in the instant case and (arguably) in In re Kelly, 401 F.2d 211 (5th Cir. 1968), have been directly rejected in Talford v. Seaman, supra and rejected in dicta in Hammond v. Lenfest, supra, Cooper v. Barker, supra, Gann v. Wilson, supra and Crane v. Hedrick, supra.[10] Cf., Craycroft v. Farrell, supra

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8/ (Continued) holding of the Court below apply whether or not the petitioner had committed a crime at the time of his petition. However, at least the Court of Appeals for the Second Circuit has declined to go this far (in Hammond v. Lenfest, supra) and the question of deferral thus turns on factors such as the timing of combat orders, prosecutorial discretion and the like. Compare also Noyd v. Bond, supra at footnote 1 (p.685) and cf. the Ninth Circuit's opinion below at 4.

9/ See e.g., Noyd v. Bond, supra at footnote 1 and cases there cited. Cf., Craycroft v. Farrell, [397 U.S. 335] supra, noting the existence of a "conflict among the circuits" relating to the need "to seek relief in the Court of Military Appeals."

10/ The latter two decisions from the Northern District of

[408 F.2d] at footnote 1. Similarly, on the closely analogous question of exhaustion before Military Records correction boards the Ninth Circuit has, as noted, explicitly required such exhaustion. Craycroft v. Farrell, supra; cf., Krieger v. Terry, 413 F.2d 73 (9th Cir. 1969). Directly to the contrary is the Fourth Circuit's decision in United States ex. rel. Brooks v. Clifford, supra, as well as dicta in several other cases. See, e.g., Hammond v. Lenfest, supra and Robert v. Commanding General, 314 F.Supp. 998, 1001 (D. Md. 1970).

Taken as a whole, what such cases reflect is not simply the difficulty of the problem here presented,[11] but the absence of a unifying foundation or rationale to be applied in consideration of such claims. We believe that the test proposed above - distinguishing between exhaustion of direct and "ancillary" remedies - could help supply the needed guidance. Yet, in any event, reconciliation or at least consideration by this Court is manifestly required. See Davis, ADMINISTRATIVE LAW TREATISE, 1970 Supplement at 643-644.[12]

10/ (Continued) California were, of course, disapproved on this point by the Ninth Circuit in this case.

11 In its Opinion below in these proceedings the Ninth Circuit noted forthrightly that "the question [presented] is not an easy one." Opinion at 2:17.

12 Speaking to the question of exhaustion of remedies generally, Professor Davis has noted that although the recent decision of this Court in McKart v. United States, supra (discussed infra in text) was beneficial "more such opinions are needed to clarify the law of exhaustion." Davis, supra at 644.

Beyond the conflicting holdings and language in prior cases below, the decision of the Court of Appeals would appear, at best, questionable in light of principles recently enunciated by this Court in McKart v. United States, supra. Indeed, McKart was relied upon strongly by the Fourth Circuit in refusing to require exhaustion before the ABCMR in United States ex. rel. Brooks v. Clifford, supra.

As Petitioner reads McKart, that case requires the problem of exhaustion in a given case to be considered in relation to "its purposes and ... the particular administrative scheme involved." (See 395 U.S. at 193). More, as there emphasized, where the interplay of exhaustion and the right to judicial review involves a peril to liberty there must be "a governmental interest compelling enough to outweigh the severe burden placed on petitioner". (395 U.S. at 197). On such grounds this Court held in McKart that a selective service registrant, entitled to exemption from military service as a "sole surviving son", was entitled to raise his erroneous reclassification as a defense to prosecution for failure to submit to induction notwithstanding his failure to exhaust all available administrative remedies.

Subsequently, in considering the closely analogous problem of exhaustion before the ABCMR in Brooks, the Fourth Circuit found McKart, if not dispositive on its facts, at least highly persuasive. There, the court ruled that past the point where exhaustion of remedies is mandated by an express statute

or regulation, exhaustion should be required only to uphold the "integrity" of the administrative (or military) process, to permit creation of a full record or to permit exercise of peculiar expertise (412 F.2d at 1138-1140). So viewed, in accordance with the Fourth Circuit's understanding of McKart, the Correction Board was held not to present a remedy requiring exhaustion before a petitioner could seek a discharge from the military via habeas corpus in the federal courts. Even granting the possibility that the ABCMR could provide relief in some cases the court felt bound to "consider whether this interest [in reducing the judicial case load] outweighed the burdens which may be imposed upon the petitioner by the constant and continuous delays in the final determination of his claim." So viewed, such interest was found insufficient:

> "If petitioner's claim of conscientious objection is well-founded (and we have decided that it is), petitioner, and others similarly situated, will be required to litigate administratively during a period in which each hour of each day they are required to engage in conduct inimical to their consciences or be subject to court martial, with the added risk that in the ordinary course of the operations of the military, they may be ordered to a duty even more offensive to them." (412 F.2d at 1141).

Given the even more compelling circumstances of this case, petitioner submits that the rationale of McKart and Brooks at the least requires full consideration by this Court, if not summary reversal.

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CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Dated: February 26, 1971.

Respectfully submitted,

GEORGE A. BLACKSTONE
RICHARD L. GOFF
STEPHEN V. BOMSE
DOUGLAS M. SCHWAB

By _____
GEORGE A. BLACKSTONE

CERTIFICATE OF SERVICE BY MAIL

SUPREME COURT OF THE)
) NO.
UNITED STATES)

The undersigned hereby certifies that three copies of the foregoing Petition for a Writ of Certiorari were mailed today to Solicitor General, Department of Justice, Washington D. C. 20530, as attorneys for the respondents in this cause.

Dated: February 26, 1971.

DOUGLAS M. SCHWAB

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH PARISI, Appellant,	)	
v.	)	No. 25773
MAJOR GENERAL PHILLIP B. DAVIDSON, et al., Appellees.	)	

Appeal from the United States District Court for the Northern District of California

Before: HAMLEY, ELY, and CARTER, Circuit Judges.

ELY, Circuit Judge:

This is an interlocutory appeal, under 28 U.S.C. § 1292(b), from an Order of the District Court, staying habeas corpus proceedings brought under 28 U.S.C. § 2241 until trial and final determination of court-martial charges then lodged against the appellant.

The complex history of the case is set out in detail in the margin.[1/] Briefly, Parisi is an army private who alleges that his application for discharge as a conscientious objector was denied by the army without a basis in fact for the denial. His petition was first presented to the District Court in November, 1969, but proceedings were stayed pending his administrative appeal to the Army Board for Correction of Military Records [ABCMR].[2/] A partial preliminary injunction also issued, prohibiting Parisi's assignment to any duties which required materially greater participation in combat activity or training than was being required of him in his then duties.

Before the ABCMR's decision, however, Parisi was ordered to Viet Nam, where he was to perform noncombatant

duties similar to those which had been assigned to him and which he had been performing in this country. After unsuccessful attempts to win a stay of his redeployment order both from our court and from the Circuit Justice, Parisi chose, with all attendant risks, to disobey a military order to enplane for Viet Nam. Charges were then immediately filed against him, under U.C.M.J. art. 90, for failure to obey a lawful order.

Prior to the date set for court-martial, the ABCMR notified Parisi that it had ruled against his appeal. The District Court promptly ordered the Government to show cause why a writ should not then issue. In its return, the Government requested the stay Order in question, on the grounds that to permit concurrent federal court proceedings would constitute an unwarranted interference with the military court system.

The question is not an easy one, but we have concluded that habeas proceedings were properly stayed pending the final conclusion of Parisi's military trial and his appeals therefrom.

The military, no less an agency of the federal government than the federal court system, has the equal responsibility to act consistently with the Constitution and laws of the United States.[3] While civilian courts are available to correct, in a proper case, abuses by military authorities,[4] they must be careful to avoid unwarranted interference with internal military matters.

> "[J]udges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community

> governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."

Orloff v. Willoughby, 345 U.S. 83, 93-94, 97 L. Ed. 842, 73 S. Ct. 534 (1953). Thus, there is the general rule that:

> "[H]abeas corpus petitions from military prisoners should not be entertained by federal civilian courts until all available remedies within the military court system have been invoked in vain."

Noyd v. Bond, 395 U.S. 683, 693, 22 L. Ed. 2d 631, 89 S. Ct. 1876 (1969).[5/]

Parisi does not argue the wisdom and correctness of the exhaustion of administrative remedies doctrine as applied to military proceedings. He strenuously contends, however, that the doctrine was improperly applied in the court below.

First, Parisi argues that the doctrine applies only to administrative, not judicial remedies. The risk of imprisonment and dishonorable discharge inherent in military judicial proceedings, he claims, renders it unfair to require one first to assert his claims as defenses at a military trial before being able, successfully, to initiate habeas proceedings in a federal civilian court.

In support of this argument, Parisi relies, primarily, upon Crane v. Hedrick, 284 F. Supp. 250 (N.D. Cal. 1968). There, it appears that the district judge expressly rejected Government contentions that a claim of wrongful detention in the military by an inservice conscientious objector must first be raised as a defense to court-martial, noting that

> "[i]f [the Government's] contentions were to prevail, the only way one in petitioner's position could raise his constitutional claims

of wrongful detention would be by first committing a crime and facing the possibility of imprisonment."

284 F. Supp. at 253.

However, assuming, arguendo, the correctness of Crane, the case is distinguishable. Crane was a sailor who deserted his ship after his application for conscientious objector discharge was administratively denied, but before formal charges were brought against him in military court. We note the reasoning, on similar facts[6], of Judge Kaufman in Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968):

> "[A]lthough the government maintains that Hammond should present his claim as a defense to a court martial, it fails to explain wherein lies his power to convene the court martial that is supposedly to judge him. And, as Professor Jaffe posits, where '[o]ne must at his risk await such further enforcing procedure as the agency chooses to initiate * * * the exhaustion doctrine is inapplicable; the person has no remedy.' Jaffe, The Exhaustion of Administrative Remedies, 12 Buff. L. Rev. 327, 329 (1963)."

398 F.2d at 714.

This reasoning is inapposite to Parisi's case, for when the District Court issued the Order here challenged, charges had then already been filed against Parisi by the military authorities, the tribunal that was to judge him had already been convened, and the trial itself was imminent. Parisi was not under the burden of being required to commit a further military "crime" in order to provide himself with a forum. He had already done the act alleged to be unlawful. Thus, we cannot see that either Crane or Hammond supports Parisi's argument.[7]

In Gann v. Wilson, 289 F. Supp. 191 (N.D. Cal. 1968), an inservice conscientious objector was granted habeas relief during the pendency of his Article 90 court-martial for failure to obey orders which were given after

administrative denial of his application for conscientious objector discharge. But Gann relied solely on Crane and Hammond, supra, and we think that such reliance was misplaced.[8/]

Here, the District Court relied upon In re Kelly, 401 F.2d 211 (5th Cir. 1968), wherein the Fifth Circuit upheld a stay order on facts very similar to those before us.[9/] Parisi's attempts to distinguish Kelly, arguing that there, habeas was invoked after formal court-martial charges were lodged, whereas he sought habeas before he committed the disobedience leading to the military charges against him.[10/] However, Parisi's November, 1969 petition was prematurely filed under our rule in Craycroft v. Farrell, 408 F.2d 587 (9th Cir. 1968), vacated and remanded, 397 U.S. 335 (1970). When the ABCMR ruled in March, 1970, satisfying the administrative exhaustion requirement, Parisi renewed his petition, as was proper, but he, at that time, was already facing court-martial. Thus, he is in the same position as was Kelly in the Fifth Circuit.

We are not blind to the possible moral dilemma that Parisi faced. We cannot quarrel with the proposition that disobedience based on the dictates of religious conscience is based on "an obligation, superior to that due the state, of not participating in war in any form." United States v. Seeger, 380 U.S. 163, 172, 13 L. Ed. 2d 733, 85 S. Ct. 850 (1965). However, the District Court's injunction was reasonable and afforded ample protection for Parisi's religious scruples. Three judges of our court and our Circuit Justice found that the military order for Parisi's redeployment did not, in the circumstances, violate the District Court's protective order. While Parisi may honestly have disagreed, that disagreement cannot be held to have justified his unilateral determination to defy his military

superiors, not to mention the federal judges who had considered and rejected his claim. Were every soldier dissatisfied with some phase of national policy or military effort allowed to exercise similar discretion, necessary military discipline would collapse. Had Parisi bided his time, it appears, on the record before us now, that he likely would have obtained the relief he sought from the District Court. If the fruits of his impatience are bitter, he has only himself to blame for their production.

A serviceman facing court-martial should not be permitted habeas relief in a federal court during the pendency of his military trial and appeals therefrom, except, perhaps, when it might appear that no military tribunal to which he has recourse is capable of granting an appropriate remedy.

In possible anticipation of this qualified conclusion, Parisi argues that the relief he sought in the District Court is in fact elsewhere unavailable. This argument is based on two grounds. First, Parisi asserts that denial of an application for conscientious objector discharge without a basis in fact is not recognized as a defense to an Article 90 court-martial. Second, he argues that even if his claim were a good defense, and established to the satisfaction of the military court, the only remedy he could there expect would be acquittal, not the honorable discharge that might be ordered by a District Court.

Were this true, we would hesitate to subject Parisi to the rigors of a fruitless series of appeals; however, we are not convinced that he is correct in his interpretation of the existing state of military law.

Parisi supports the first of the arguments now under discussion only by his interpretation of certain of the rulings of the military judge at his court-martial.[11/]

It appears to us, however, that if error in the military court is indicated, it is not that the military judge refused to review the merits of Parisi's conscientious objector claim, but that he may have adopted an improperly narrow standard for review thereof. This is surely an appropriate point to present to the military's appellate tribunals, and we are referred to no case from the Court of Military Appeals, the highest military court, indicating that an appropriate constitutional standard will not be required.[12/]

Parisi is also unable to support his contention that the military appellate tribunals are unable to grant him a discharge no matter what his defense is. We are not now prepared to assume that, if it is determined that Parisi's application for discharge was denied without basis in fact, an error of such constitutional magnitude cannot be rectified by a reviewing court within the military system.[13/] If it should eventually come to pass that the military courts will not apply those constitutional principles which must control their decisions, as well as ours, Parisi may then bring that fact to the attention of the District Court.

Affirmed.

United States Circuit Judges

Footnote 1/ (Reference page 1)

Joseph Parisi was drafted on August 22, 1968. According to the inservice conscientious objector application he filed with the Army on May 22, 1969 (pursuant to Army Regulation (AR) 635-20), Parisi had doubts at the time of his induction about his feelings toward military service. However, his beliefs did not coalesce into conscientious objection until he was well down the road of basic training and initial duty assignment (psychological social work and counseling). His application, which was made prior to issuance of any order for redeployment to a combat station, also stated that his Army experiences to that point led him to the firm conviction that participation in any form of military activity conflicted irreconcilably with his Christian beliefs.

The initial interviews mandated by AR 635-20 uniformly terminated in Parisi's favor; the base Chaplain, the base psychiatrist, and the special hearing officer (as well as Parisi's immediate supervisor) all attested to the sincerity and religious nature of Parisi's conscientious objection to military service. According to the record, the Commander of the Army hospital at Parisi's base as well as the Commanding General of his training center also recommended approval of the application, although they did not interview Parisi personally. However, Parisi's immediate commanding officer, Captain Hubman, recommended disapproval, with the notation, "Consider application contrary to paragraph 3b(3) AR 635-20." This paragraph provides that conscientious objector applications will not be favorably considered when:

> "(3) Based on essentially political, sociological, or philosophical views, or on a merely personal moral code."

Captain Hubman had not interviewed Parisi nor had he engaged in any conversations with Parisi about the latter's religious beliefs and convictions.

In November, 1969, the Department of the Army denied Parisi's application. That office noted two reasons for its decision: (1) that Parisi's professed beliefs became fixed prior to entering the service, and (2) that Parisi was not truly opposed to all war due to his religious beliefs, as demonstrated by his attempts thus far to support it.

Parisi then applied to the Army Board for Correction of Military Records (ABCMR) for review of the denial of his discharge. Shortly thereafter, on November 28, 1969, he applied to the United States District Court for the Northern District of California for a writ of habeas corpus. He therein sought discharge from the Army as a conscientious objector.

In his habeas petition Parisi claimed that there was no basis in fact for the grounds cited by the Department of the Army in denying his application for a discharge. In addition, Parisi sought a preliminary injunction pending disposition of the proceeding to prevent respondents from: (1) requiring him to obey an order of August 8, 1969, to undergo training preparatory to being transferred to Viet Nam for duty; and (2) transferring him outside the jurisdiction of the District Court where the proceeding was commenced.

On the day the petition was filed, the District Court, after a hearing, entered an Order enjoining respondents from assigning Parisi to any duties which required materially greater participation in combat activity

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or training than was being required of him in his then present duties. This Order was to remain in effect pending decision by the ABCMR on Parisi's application to it for discharge as a conscientious objector.

The district court order recites that the court would retain jurisdiction of the case until the ABCMR made its decision. The Order also denied Parisi's application for a preliminary injunction against his transfer out of the Northern District of California. On December 4, 1969, Parisi took an interlocutory appeal (No. 25,133 in this court) from the Order denying his requested preliminary injunction.

About this time, Parisi received orders to process out of his then duty station at Fort Ord, California, and, following training, to report to the Overseas Replacement Station at Oakland, California, on December 31, 1969. This was later changed to the United States Army Personnel Center, Fort Lewis, Washington. Parisi then moved in this court for an order staying his deployment outside the Northern District of California pending disposition of his appeal.

Three other judges of our court denied the motion on December 10, 1969, "on condition that Respondents produce Appellant in this district if the appeal results in his favor." On December 29, 1969, the Circuit Justice denied a similar application for a stay.

Parisi reported, on December 31, 1969, as directed, to the United States Army Personnel Center, Fort Lewis, Washington. At that time he requested an opportunity to file a second application for discharge as a conscientious objector. As required by AR 635-20, he was given seven days to complete his application. However, on January 6, 1970,

Parisi advised the authorities at the Personnel Center that he no longer wished to make out an application. Accordingly, he was booked for transportation overseas.

Parisi then refused to obey a military order to board a plane for Viet Nam. He was immediately charged with violating Article 90 of the Uniform Code of Military Justice, 10 U.S.C. § 890, and was confined to the Post Stockade, pending disposition of the charge against him.

On March 2, 1970, while Parisi's court-martial was pending, the ABCMR notified Parisi of its rejection of his application for relief from the Army's denial of his discharge request. Four days later the District Court, pursuant to Parisi's habeas petition, entered an Order requiring respondents (appellees in this appeal) to show cause why a writ should not be issued. The United States responded by moving in the District Court for a stay of the habeas proceedings pending exhaustion of Parisi's military judicial remedies.

At this point Parisi suggested to a panel of judges of our court that the first interlocutory appeal he had taken from his habeas proceeding (No. 25,133 in this court, above) should be dismissed as moot. As noted, the ABCMR had by this time denied him relief, and, since he was incarcerated at Fort Lewis, there was no remaining need for an injunction to keep him in this country. We entered the requested Order, dismissing the first appeal, on March 17, 1970.

On March 31, 1970, responding to the Government's motion that it abstain pending completion of Parisi's court-martial proceedings, the District Court entered an Order staying its consideration of Parisi's habeas petition until there was a trial and a final judgment in the military courts.

on the court-martial charges.

The District Court did not stay the court-martial proceedings pending our consideration of the interlocutory appeal, nor have we done so; consequently, in the interim between the date of the district court order, March 31, 1970, and the date of our acceptance of the appeal, April 24, 1970, Parisi was, on April 8, 1970, court-martialed and convicted of the charge against him. He is presently confined in the United States Army Disciplinary Barracks, Fort Leavenworth, Kansas, serving a sentence of two years at hard labor, with dishonorable discharge. We have been advised that his appeal before the Court of Military Review is now pending.

Footnote 2/ (Reference page 1)

This is the exhaustion requirement deemed controlling in Craycroft v. Ferrall, 408 F.2d 587 (9th Cir. 1969), vacated and remanded, 397 U.S. 335 (1970). See also Bratcher v. McNamara, 415 F.2d 760 (9th Cir. 1969); Krieger v. Terry, 413 F.2d 73 (9th Cir. 1969). In Craycroft's appeal before the Supreme Court, the Solicitor General conceded that the administrative remedies which our court had required to be exhausted were either unavailing or had already been exhausted. 397 U.S. at 335.

Footnote 3/ (Reference page 2)

Craycroft v. Ferrall, 408 F.2d 587, 595 (9th Cir. 1969), vacated and remanded, 397 U.S. 335 (1970).

Footnote 4/ (Reference page 2)

See, e.g., Burns v. Wilson, 346 U.S. 137 (1953); Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968); Crane v. Hedrick, 284 F. Supp. 250 (N.D. Cal. 1968).

Footnote 5/ (Reference page 3)

This rule was established by Gusik v. Schilder, 340 U.S. 128 (1950). There, Mr. Justice Douglas, speaking

for a unanimous Court, more precisely expressed the rationale for this result:

> "An analogy is a petition for habeas corpus in the federal court challenging the jurisdiction of a state court. If the state procedure provides a remedy, which though available has not been exhausted, the federal courts will not interfere. . . . The policy underlying that rule is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved. . . . Such a principle of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile."

Id. at 131-32. The deference thus deemed appropriate is not demanded by our court's jurisdictional limitations, but by sound considerations of comity. Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968); In re Kelly, 401 F.2d 211 (5th Cir. 1968). So, in an appropriate case, habeas may be entertained without strict adherence to the exhaustion requirement. In re Kelly, supra.

We have apparently not dealt with the precise exhaustion question raised by this appeal. We declined to consider the issue in Craycroft v. Ferrall, 408 F.2d 587, 589 n.1 (9th Cir. 1969), vacated and remanded, 397 U.S. 335 (1970). There we

> ". . . distinguish[ed] our analysis of the exhaustion [of administrative remedies] problem from cases in which, once military administrative remedies have been exhausted, in-service conscientious objectors were allowed to seek civil relief before enduring court-martial proceedings and exhausting possible appeals therefrom."

at 589 n.1 (citations omitted).

Last term the Supreme Court also declined to resolve the question whether inservice conscientious objectors who have exhausted administrative remedies must also undergo court-martial proceedings before seeking habeas relief, although it noted that the Circuits have divided on the issue. Noyd v. Bond, 395 U.S. 683, 685 n.1 (1969) (citing cases).

Footnote 6/ (Reference page 4)

Hammond's application for discharge from the Navy on conscientious objector grounds had been denied before habeas was sought, but no military charges were then pending against him.

Footnote 7/ (Reference page 4)

The distinction drawn herein was implicitly recognized in Hammond, where the Second Circuit distinguished Gusik on the grounds that Gusik "had already been court-martialled and the Court simply concluded that once that route had been traversed, it was incumbent upon him to exhaust his appeal . . . ." 398 F.2d at 713.

Footnote 8/ (Reference page 5)

Parisi also relies on Talford v. Seaman, 306 F. Supp. 941 (D. Md. 1969) and Cooper v. Barker, 291 F. Supp. 952 (D. Md. 1968). These cases, however, present no new considerations.

Footnote 9/ (Reference page 5)

Kelly was an inservice conscientious objector court-martialed for wilful disobedience of a superior officer. He brought habeas proceedings during the pendency of his court-martial.

Footnote 10/ (Reference page 5)

Parisi also asserts that Kelly rested, in part,

on the court's conclusion that there was little chance of Kelly's success on the merits of his petition in the District Court.

Footnote 11/ (Reference page 6).

"Well, I do not read Noyd the way you do as requiring that I make a decision and a determination of the basis in fact other than to examine the entire file and the entire record, and in my view determine whether or not the ruling of the Secretary of the Army was arbitrary, capricious, unreasonable, or an abusive [abuse of?] discretion. Now, that may be saying in different words that I am ruling on the basis in fact. I'm not sure about that. But I do not consider that to be -- and I want the record to so reflect, so that you may have an opportunity to get a definite ruling on it -- that I am not ruling solely as a basis of fact. I am ruling that I have examined this document. I have studied it. I find it conforms to AR 635-20. There has been no deprivation of administrative due process and I find from the examination of this record that the ruling of the Secretary of the Army was not arbitrary, capricious, unreasonable, or an abusive [abuse of?] discretion."

Footnote 12/ (Reference page 7).

In fact, Parisi himself argued at his court-martial that United States v. Noyd, 18 U.S.C.M.A. 483, 40 C.M.R. 195, 2 S.S.L.R. 3218 (1969) had settled that review of the basis in fact for administrative denial of a conscientious objector discharge was proper on the issue of the lawfulness of the order alleged to have been disobeyed. United States v. Wilson, 2 S.S.L.R. 3548 (U.S.C.M.A. 1969) is not contrary. There, the accused had refused an order to put on his uniform, was court-martialed, and the following instruction was given by the law officer: " . . . Personal scruples or qualms, whether

otherwise, are no defense to the offense of wilful disobedience of the order as alleged . . . ."

In upholding this instruction, the Court of Military Appeals remarked:

> "As Noyd indicated, the freedom to think and believe does not excuse intentional conduct that violates a lawful command. . . . If the command was lawful, the dictates of the accused's conscience, religion, or personal philosophy could not justify or excuse disobedience."

2 S.S.L.R. at 3548. However, Noyd seems to make it clear that a defendant's religious convictions are admissible on the issue of the lawfulness of the order allegedly disobeyed. If he were erroneously denied discharge as a conscientious objector, some type of subsequent orders, obviously conflicting with his religious convictions, could be unlawful:

> "Colonel Hansen testified he gave the accused the order to fly as an F-100 instructor only after he had been informed the application for separation [as a conscientious objector] had been denied. The validity of the order, therefore, depended on the validity of the Secretary's decision . . . . If the Secretary's decision was illegal, the order it generated was also illegal."

United States v. Noyd, supra at 3221.

Thus, Wilson merely stands for the proposition that an inservice conscientious objector must obey "lawful" orders, not all orders. See also United States v. Dunn, 38 C.M.R. 917 (1968); United States v. Taylor, 37 C.M.R. 547 (1966).

In this connection, we think the legality of any such subsequent military order could not be determined without consideration of its nature, in scope and magnitude. Obviously, an inservice objector, remaining in the service pending the review of the denial of his claim for discharge,

report for muster and drill or an order to maintain himself and his quarters cleanly and neatly. Here, again, we note that the District Court had protected Parisi against exposure to violence. Cf. Kemble v. Commandant, 12th Naval Dist., ___ F.2d ___ (9th Cir. Feb. 25, 1970).

Footnote 13/ (Reference page 7)

The All Writs Act, 28 U.S.C. § 1651(a), has been held to permit a military court to issue all "writs necessary or appropriate in aid of [its] . . . jurisdiction." United States v. Frischholz, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966). The military court's power to issue emergency writs of habeas corpus is well-settled. Noyd v. Bond, 395 U.S. 683, 695 n.7 (1969); Levy v. Resor, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967).

FILED

MAR 6 - 1970

CLERK, U.S.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSEPH PARISI,

Petitioner,

vs.

MAJOR GENERAL PHILLIP DAVIDSON, Commanding General, United States Army Training Center, Fort Ord, California; CAPTAIN COUGHLIN, Commanding Officer, Hospital Company, United States Army Training Center, Fort Ord, California; STANLEY RESOR, Secretary of the Army,

Respondents.

No. C-69-470-LHB

ORDER STAYING PROCEEDINGS AND CERTIFYING FOR INTERLOCUTORY APPEAL.

This matter came on regularly for hearing on March 26, 1970 pursuant to this court's order to show cause dated March 6, 1970, and pursuant to Respondents' motion for stay of proceedings pending exhaustion of military judicial remedies. Richard L. Goff and Douglas M. Schwab appeared as counsel for petitioner; Steven Kazan, Assistant United States Attorney, appeared as counsel for respondents. After considering the documents and records on file in this action, and the oral arguments of counsel, and good cause appearing therefor,

1. IT IS HEREBY ORDERED that these proceedings are hereby stayed until there has been trial and a final judgment in the military courts on the court martial charges presently

APPENDIX B

Eagle Kelly, 401 F.2d 211 (5th Cir. 1968); followed Berry v. Commanding General, 411 F.2d 822 (5th Cir. 1969); compare Noyd v. McNamara, 267 F. Supp. 701 (D. Colo. 1967); aff'd 378 F.2d 538 (10th Cir. 1967), cert. den. 389 U.S. 1022 (1957); see United States v. Noyd, 18 USCMA 483, 40 CMR 195 (1969). Cf. McFadden v. Selective Service System, 415 F.2d 1140, 1141 (9th Cir. 1969).

2. It is the opinion of this court that this order involves a controlling question of law as to which there is a substantial ground for difference of opinion, */ to wit:

> If a member of the Armed Services has filed in the Federal District Court a petition for a Writ of Habeas Corpus discharging him from the armed services on the ground of wrongful denial of his application for discharge as a conscientious objector, and if, while such proceedings are pending, he is charged by military authorities with refusing to obey a military order given to him after the filing of such Habeas Corpus petition, is it proper for the District Court to stay all further proceedings on the petition for the Writ of Habeas Corpus until the termination of court martial proceedings on the military charges against the petitioner?

and that an immediate appeal from this order may materially advance the ultimate termination of this litigation;

Dated: March 31, 1970

Order approved as to form

Richard L. Gelb
Attorney for Petitioner

United States District Judge

Paragraph 2 of order approved as to form

Attorney for Respondents

*/ See Gann v. Wilson, 289 F. Supp. 191, 193 (N.D. Cal. 1968); Crane v. Hedrick, 284 F. Supp. 250 (N.D. Cal. 1968); Talford v. Seaman, 306 F. Supp. 941 (D.Md. 1969); Hammond v. Lenfest, 398 F.2d 705, 712-14 (2d Cir. 1968); Cooper v. Barker, 291 F. Supp. 952 (D.Md. 1968).